(7)

No. 89-1647

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE INTERNATIONAL COMMITTEE OF PASSENGER LINES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The International Committee of Passenger Lines ("International Committee") respectfully submits this brief as Amicus Curiae in support of Petitioner Carnival Cruise Lines, Inc., regarding the question of the enforceability of the forum selection clause in the Petitioner's cruise ticket contract. The Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was granted on October 1, 1990. Counsel for Petitioner and Respondent have each consented to leave for the filing of this Amicus Curiae Brief. Copies of letters confirming the consent have been filed with the Clerk.

I

INTEREST OF THE AMICUS CURIAE

The International Committee is a domestic, non-profit association of sixteen passenger cruise lines owning and operating more than eighty vessels which call at various domestic and foreign ports. The passenger cruise industry has dramatically increased in popularity over the past ten years, and represents a substantial proportion of vacation time and expenditure by U.S. citizens. Cruise vessels routinely call at numerous ports (domestic and foreign) and attract passengers from varying domiciles throughout the United States. Frequently, U.S. citizens travel by airplane from their residences to an embarkation port in the United States and visit numerous foreign ports on the cruise ship before returning to a United States port and their domiciles.

Each of the member cruise lines of the International Committee issues passenger ticket contracts which designate a forum for resolving legal disputes arising from the contract of passage. The legal question of the enforceability of the forum selection clause in the Petitioner's ticket contract in this case is therefore important to each member cruise line of the International Committee and the cruise line industry in general.

II

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below holds that a forum selection clause in a passenger cruise ticket is unenforceable on grounds of public policy because of the perceived disparity in bargaining power between the passenger and the cruise line. This directly conflicts with the decision of the Third Circuit in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione,* 858 F.2d 905 (3d Cir. 1988), *cert. dismissed,* ___ U.S. ___, 109 S.Ct. 1633 (1989), and is contrary to the prima facie validity accorded such clauses by this Court in *M/S BREMEN v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972) (*"The Bremen"*). In refusing to enforce the forum selection clause because the terms and conditions of the ticket were not freely bargained for, the Ninth Circuit erroneously relied on

state law, rather than federal admiralty law. A passenger's ticket contract for an ocean cruise is maritime and therefore is governed by federal maritime law, which is intended to be uniform throughout the nation.

Each cruise line represented by this Amicus includes a forum selection clause in its passenger ticket contract. These forum clauses serve legitimate purposes for both the passenger and cruise line. They benefit the passenger by providing certainty and predictability in matters of personal jurisdiction and venue, and eliminate the burdens of global litigation for a cruise line.

The inclusion of a forum clause in a standard, pre-printed form passenger ticket does not itself evidence oppressive or overreaching conduct by a cruise line. In the absence of an unlawful purpose, fraud or overreaching, a passenger ticket contract which effectively communicates the importance of a forum clause should be enforced by the courts.

III

ARGUMENT

A. A Forum Selection Clause in a Passenger Ticket Contract Is Prima Facie Valid.

A passenger cruise ticket for an ocean voyage is a maritime contract, and disputes arising under it are governed by the substantive law of admiralty. *See The Moses Taylor,* 71 U.S. (4 Wall.) 411, 427 (1867); *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), *rehearing denied,* 359 U.S. 962 (1959). The nature of maritime commerce requires that the substantive rights and responsibilities of shipowners and passengers be uniform throughout the United States. *See The Lottawanna,* 88 U.S. (21 Wall.) 558 (1875); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917); *Romero v. International Terminal Operating Co.,* 358 U.S. 354; *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 401-402 (1970). The need for national uniformity of the substantive maritime law is particularly compelling in the case of cruise lines whose vessels, on any given voyage,

may call at several ports in domestic and foreign commerce, and embark passengers from many diverse domiciles.

The cruise line members of the International Committee issue pre-printed ticket contracts to passengers. Each of those ticket contracts includes a forum selection clause. Petitioner's ticket contract specifies Florida, its principal place of business, as the forum for adjudicating disputes with passengers.

A forum selection clause in a passenger ticket serves legitimate purposes. The forum clause provides a passenger with advance notice where suit can properly be brought against the cruise line. Since the forum selection clause is tantamount to a confession of personal jurisdiction, it eliminates any such question. *See National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-316 (1964). In addition, a forum clause removes the potential of global litigation for the cruise line. *See The Bremen,* 407 U.S. at 13-14. Enforcement of a ticket clause designating a forum which is not the personal residence of a passenger undeniably results in some inconvenience to a passenger-litigant. In the absence of an enforceable forum clause, however, cruise line passengers from widely differing domiciles throughout the United States would have discretion to bring suit wherever personal jurisdiction could be obtained, or where the accident giving rise to the suit occurred. The resulting uncertainty of venue and jurisdiction frequently provokes pre-trial motions for change of venue or to dismiss on grounds of *forum non conveniens.*[1]

Ticket contracts containing conditions and limitations have been used by cruise lines for over a century. Whether such limitations are contractually binding on the passenger has been the subject of litigation for almost as long. This Court first considered that question in *The Majestic,* 166 U.S. 375 (1897), and declined to enforce a limitation of liability clause only because it was not properly incorporated into the contract. Later, in *New York Central & Hudson River Railroad Co. v. Beaham,*

[1] As noted by Justice Kennedy's concurring opinion in *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 33 (1988), the federal judiciary has a strong interest in eliminating the time and expense involved in such potentially wasteful motions.

242 U.S. 148 (1916), this Court held that a similar limitation of liability clause was enforceable because it was properly incorporated into the ticket contract.

The decision below invalidates the Petitioner's forum selection clause for reasons of public policy, citing the absence of evidence that the passenger had the opportunity to bargain over the terms of the ticket contract. This Amicus does not dispute the underlying assumption that a passenger rarely engages in actual bargaining for a particular forum clause in the ticket contract. Indeed, present day travel and commercial reality render such bargaining impractical, if not impossible. The courts, however, have enforced these forum selection clauses even though the underlying contract is in a pre-printed form. *See Shankles v. Costa Armatori, S.P.A.,* 722 F.2d 861 (1st Cir. 1983).

The federal courts, when called upon to decide whether a limiting provision in a ticket is contractually binding on the passenger, have consistently utilized the "reasonable communicativeness" test first adopted by the Second Circuit in *Silvestri v. Italia Societa Per Azione Di Navigazione,* 388 F.2d 11 (2d Cir. 1968). In that case, Judge Friendly noted that the common thread running through the cases upholding such limiting provisions was the fact that the shipowner had done all that it reasonably could to warn the passengers that the conditions were important and affected their legal rights. When the terms and conditions of the ticket have been "reasonably communicated" in this fashion, they are binding on the passenger. The First, Second, Third, Fifth and Sixth Circuits have all adopted this "reasonable communicativeness" test. *See,* e.g., *Muratore v. M/S SCOTIA PRINCE,* 845 F.2d 347 (1st Cir. 1988); *Silvestri,* 388 F.2d 11; *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3d Cir.), *cert. denied,* 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi A/S,* 604 F.2d 11 (5th Cir. 1979); *Barbachym v. Costa Line, Inc.,* 713 F.2d 216 (6th Cir. 1983).[2]

[2] The reasonable communicativeness test has also been applied by the Ninth Circuit in upholding the enforceability of limiting conditions in pre-printed airline ticket contracts. *See Deiro v. American Airlines, Inc.,* 816 F.2d 1360 (9th Cir. 1987).

As the reasonable communicativeness test has developed, some courts have confined their analysis to the physical characteristics of the ticket itself, considering the type size of the forum or other limiting clause, and whether it has sufficient prominence to be deemed incorporated within the contract. *See,* e.g., *Barbachym,* 713 F.2d 216. Other courts have, in addition, focused on extrinsic factors surrounding the purchase and review of the ticket, inquiring whether the passenger had an opportunity to become knowledgeable of the contract's limitations. *See,* e.g., *Shankles,* 722 F.2d 861. Under this latter, two-pronged test, the courts have held that a limiting clause is binding on a passenger even if the contract was not read, provided the passenger had an opportunity for such review. *See DeNicola v. Cunard Line, Ltd.,* 642 F.2d 5 (5th Cir. 1981).[3]

The Ninth Circuit's decision in the case below ignores this long history of enforcing limiting provisions in maritime ticket contracts when those provisions have been reasonably communicated to the passenger. Instead, the court—erroneously, this Amicus submits—looked to state law to determine that because the forum selection clause in the pre-printed ticket contract was not negotiated, it was unenforceable. *See* Appendix to Petition for Writ of Certiorari at 23a. While the individual states may have varying views as to the enforceability of contract forum selection clauses

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[3] The reasonable communicativeness test has been specifically used as a benchmark for testing the validity of one-year time limitations for suit provisions in passenger ticket contracts. Section 183b, Title 46 U.S.C., which prohibits time bar suit limitations of less than one year, was enacted to prevent cruise lines from imposing unreasonably short periods of time on passengers. *See Catterson v. Paquet Cruises,* 513 F. Supp. 645 (S.D.N.Y. 1981); *Barrette v. Home Lines, Inc.,* 168 F. Supp. 141 (S.D.N.Y. 1955). Noncompliance with a one-year suit clause requires dismissal of the action unless the particular ticket fails to give reasonable notice of the limiting condition. *Catterson,* 513 F. Supp. 645. Amicus submits that the one-year suit provision authorized by § 183b should be viewed as tacit approval by Congress of the imposition of reasonable limitations in passenger cruise contracts, irrespective of the fact that these ticket contracts are in a pre-printed form. Cf. *Cannon v. University of Chicago,* 441 U.S. 677, 696-97 (1979).

within their own borders, the nature of maritime commerce requires that the rights and responsibilities of shipowners and their passengers not vary according to the passengers' domicile and the jurisdictions in which the vessels operate. The Ninth Circuit's reliance on state law in declaring the forum clause unenforceable violates the constitutional principle that the maritime law should apply uniformly throughout the nation. *See The Lottawanna,* 88 U.S. (21 Wall.) 558; *Southern Pacific Co. v. Jensen,* 244 U.S. 205.

The prima facie enforceability of limiting provisions in maritime contracts was most recently confirmed by this Court in *The Bremen,* 407 U.S. 1. That case involved a maritime contract, between two commercial entities, which included a London forum selection clause. This Court held that the admiralty law should give effect to such forum selection clauses, and that they are considered prima facie enforceable even if contained in contracts that are not the product of negotiation. *See* 407 U.S. at 9-10.

B. A Forum Selection Clause Should Be Enforced Absent Specific Evidence of Fraud or Overreaching or that Enforcement Would Unreasonably Deny the Passenger a Day in Court.

In *The Bremen,* 407 U.S. 1, this Court held that a forum selection clause in a maritime contract should control, absent a strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid because it was inserted in the contract by fraud or overreaching. *Id.* at 15. Despite the fact that a contract may be adhesive, the party resisting enforcement should bear a heavy burden of proof. It is not sufficient for the plaintiff resisting enforcement to merely show that the balance of convenience strongly favors his chosen (non-contractual) forum. Instead, this Court held that " . . . it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

The most recent comprehensive discussion of forum selection clauses in cruise line passenger contracts is found in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione,* 858 F.2d 905. There, the Third Circuit relied upon this Court's decision in *The Bremen* and upheld a forum clause in a passenger's ticket requiring a New York citizen to bring suit in Italy. The Third Circuit applied the "reasonable communicativeness" test in evaluating the physical characteristics of the ticket and acknowledged that the forum clause was properly incorporated in the contract. The court then went on to rule that, despite the pre-printed form of the passenger's contract, the forum clause was enforceable under the rule of *The Bremen*. The court was persuaded that the cruise line did not make *unfair* use of its admitted superior bargaining power over the passenger, even though the specific terms of the contract were not negotiated. *See* 858 F.2d at 913, citing *Restatement (Second) of Conflict of Laws*, § 80 (1971).

The Ninth Circuit's decision below acknowledges that *The Bremen* rule is controlling, but erroneously disregards it on public policy grounds because the ticket contract was not freely negotiated. This is contrary to the rule of *The Bremen* which specifically accorded presumptive validity to forum selection clauses, and directly conflicts with the Third Circuit's opinion in *Hodes,* 858 F.2d 905, which expressly extends *The Bremen* presumption of enforceability to passenger cruise contracts.

Rather than enforce the contractually agreed upon forum, the Ninth Circuit in this case weighed and balanced the relative conveniences of the parties to suit in the chosen forum and the contract forum. That approach transformed a legal question of contract enforcement into a *forum non conveniens* issue, an analysis expressly rejected in *The Bremen. See* 407 U.S. at 8-12.

This Amicus respectfully submits that this Court should confirm the rationale of *Hodes* and extend the rule of *The Bremen* to passenger cruise contracts, properly governed by the federal maritime law. The principle articulated in *The Bremen* and followed in *Hodes* is not so mechanical or rigid that a party cannot avoid enforcement of the clause where it would truly deprive that party of the opportunity to present a case. In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), *cert.*

denied, 474 U.S. 948 (1985), for example, the court refused to enforce a presumptively valid forum selection clause in a contract designating Iran as the chosen forum. Instead, the court concluded that the post-revolutionary conditions in Iran, including the cessation of diplomatic relations between the United States and Iran, the state of war between Iran and its neighbor Iraq and the suspension of all commercial air flights to Iran, clearly made it gravely dangerous, if not impossible, to litigate in Iran. Under those circumstances, the court held that enforcement of the forum clause would have deprived the plaintiff of its day in court. Thus, under *the Bremen* test, a passenger has the opportunity to establish why the clause should not be enforced. The fact that compelling circumstances may exist in an unusual case to justify the refusal to enforce a forum clause, however, should not be allowed to dictate the rule generally applicable.

A forum selection clause in a passenger cruise ticket that is reasonably communicative, not inserted as a result of fraud or overreaching, and which does not effectively preclude a litigant from pursuing a claim, should be enforced. Recognition of the presumptive enforceability of forum selection clauses will promote certainty and predictability for the parties in resolving their disputes.

IV

CONCLUSION

The International Committee of Passenger Lines urges the Court to reverse the decision of the Court of Appeals on the ground that it fails to accord proper respect under the federal maritime law to the presumptive enforceability of a reasonable forum selection clause in a passenger cruise contract.

Respectfully submitted,

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